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No. 890

In the Supreme Court of the United States

DELLA HILL and O. M. CASS, d/b/a ALASKA MARKET,
Petitioners,

vs.

ALMA LEE MOE and JOHN DOE MOE, her husband, and RETAIL CLERKS UNION, LOCAL NO. 1689 and RETAIL CLERKS INTERNATIONAL ASSOCIATION, A. F. L. LABOR ORGANIZATIONS, *Respondents.*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

BRIEF IN SUPPORT OF PETITION

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To the Honorable, The Supreme Court of The United States:

DELLA HILL *and* O. M. CASS, the petitioners herein, pray that a Writ of Certiorari be issued to review the judgment of the Supreme Court of the State of Alaska, affirming the judgment of the Trial Court of the Superior Court for the State of Alaska, Fourth Judicial District, wherein the complaint of the petitioners herein was dismissed and judgment entered in favor of the respondents, in violation of their common law rights and the rights guaranteed them under the Constitutions of the United States and the State of Alaska.

SHORT SUMMARY AND SHORT STATEMENT OF MATTERS INVOLVED

This action arose out of the acts of the respondents and their agents in placing and maintaining an illegal picket line about the entrances of petitioner's place of business in Fairbanks, Alaska, on October 7 to and including October 11, 1954, for the purpose of coercing the petitioner's employees in their meat market to join the respondent's union in spite of the fact that they were already members of a union associated with the same parent union.

The evidence in the trial of the case showed the forceful prevention of the petitioner's customers from entering their store, the forceful and physical mishandling of the petitioner's customers, and the campaign of defamatory publication carried on in the Fairbanks' newspapers against the petitioners.

The evidence further showed that these actions of the respondents resulted in the loss to the petitioners of great sums of money and in the eventual destruction of the petitioner's business. These actions of the respondents constituted a common law tort and the petitioners sued for recovery of damages because of the tort, in the U. S. District Court and when Alaska gained statehood it was transferred to the State Court.

The trial court upon motion of respondents dismissed the cause at the end of the petitioners' evidence on the ground that the facts shown brought the case within the exclusive jurisdiction of the National Labor Relations Board, and after finding that the court had no jurisdiction dismissed the action.

It should be noted here that the evidence shows in several instances (Tr. 62, 164) that there were several acts of physical violence, in spite of the fact that the trial court found no violence, which finding was affirmed by the Alaska Supreme Court. This is pointed out for the reason that the court relied in its decision upon the last *Garmon* case (359 U.S. 236, *San Diego Building Trades v. Garman*) and the *Guss* (*Guss v. Utah Labor Relations Board*, 353 U.S. 1) case in both of which the action complained about was "peaceful picketing."

The court pointed out, referring to the *Garmon* case *supra*, that:

> "If this were a case marked by violence, intimidation, or imminent threat to public order, then the State Court would be permitted to grant compensation for the consequences as defined by the law of torts."

The transcript of the evidence shows clearly that this case was "marked by violence, intimidation, and imminent threat to public order."

For example the plaintiff Cass testified (p. 62 Tr.):

> "A. 'Well, one occasion I had rushed out, there was one of the pickets grabbing one of the customers that was coming in, and tussled with him and I run out there and call the police had him arrested, and he was up before the city magistrate.' "

And further in the deposition of Alice Sorri (Tr. p. 164), the witness, Mrs. Sorri, stated in part:

> "And I started in there and one of these kids, I couldn't identify, but he grabbed my arm and he said, 'You are not going in there'."

It is obvious that the evidence showed unquestionably that there was intimidation and violence which the trial court and the Alaska Supreme Court refused to consider.

JURISDICTION

The jurisdiction of this court is invoked under 28 U.S.C. Section 1257, since rights, privileges and immunities specially set up and claimed under the constitution of the United States and the State of Alaska have been denied.

On December 28, 1961 the Alaska State Supreme Court entered an opinion affirming the judgment of the Superior Court of the State of Alaska, Fourth Judicial District. On January 8, 1962 the said court entered a mandate completing the operation of the judgment of the superior court.

CITATIONS TO OPINIONS BELOW

The written memorandum opinion of the Superior Court for the Fourth Judicial District of the State of Alaska, is unreported but is included in the record filed herewith (St. 18-27).

CONSTITUTIONAL QUESTIONS INVOLVED

1. United States Constitution, XIV amendment, says:

> "No state shall make or enforce any law which shall abridge the privileges and immunities of the citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law; nor deny any person within its jurisdiction the equal protection of the laws."

II. United States Constitution, V amendment:

"No person shall be deprived of life, liberty or property without due process of law; . . ."

Article i, Constitution of Alaska (P2 Alaska Compiled Laws), states:

"Declaration of Rights. Section 1. Inherent Rights. This Constitution is dedicated to the principle that all persons have a natural right to life, liberty, and pursuit of happiness, and the enjoyment of the rewards of their own industries; that all persons are equally entitled to equal rights, opportunities, and protection under the law; and that all persons have corresponding obligations to the people and to the State."

"Section 21. Constitution of Alaska, states, 'Enumeration of rights in this Constitution shall not impair or deny others retained by the people.'"

QUESTIONS PRESENTED

1. In view of the type of conduct engaged in by the respondents, does the National Labor Relations Board have exclusive jurisdiction over the subject matter so as to preclude the State Court from hearing and determining the issues in a common law tort action based upon such misconduct?

The type of conduct involved, as shown by the transcript, included threats of coercion, unpeaceful picketing, and physical interference with and mistreatment of the petitioner's customers.

2. Is the State Court foreclosed from awarding damages arising from a common law tort, where the General Counsel of the National Labor Relations Board

had previously advised petitioners that the present case came within the category of cases over which the Board would not take jurisdiction.

REASONS FOR GRANTING WRIT

1. The judgment of the court below was based upon an erroneous conception of the rights of citizens under the Constitutions of the United States and the State of Alaska, in relation to powers granted to the National Labor Relations Board.

The court below deprived the petitioners of a property right without due process in violation of the above quoted Constitutional provisions, and their common law rights.

2. The judgment of the Court below approved the acts of the respondent union in picketing the premises of the petitioners, in threats of violence, and in actual acts of physical violence upon the person of the petitioners' customers.

3. The judgment of the Supreme Court of the State of Alaska was entered on December 28, 1961 and a mandata completing the affirmation of the judgment was entered on January 8, 1962. This petition is presented prior to April 27, 1962, the date to which this court extended the time for filing petition for certiorari.

4. The Federal question was timely raised and passed upon. The original complaint in the above entitled cause alleged a violation of the Constitutional rights complained of. The judgment of the Supreme Court of the State of Alaska, affirming the lower court's order and judgment in favor of respondents, generally denies petitioners a constitutional right, a common law

right, and specifically denies it in approving the respondent's deprivation of a property right of the petitioners without due process of law.

This Constitutional question was specifically raised in the petitioner's appeal to the Alaska State Supreme Court. In that appeal the petition referred to the above mentioned articles in the Constitutions of the United States and the State of Alaska concerning personal rights.

Judgment of which review is sought is the final judgment of the Supreme Court of the State of Alaska.

ARGUMENT IN SUPPORT OF PETITION

This case was tried by the trial court and its decision affirmed by the Alaska Appellate Court on the sole theory of the United States Supreme Court's holdings in the case of *San Diego Building Trade Council v. Garmon*, 359 U.S. 236, 246 L.ed. 775, 784 (1959), and *Guss v. Utah Labor Relations Board*, 353 U.S. 1, 8, 1 L.ed.2d 601, 606 (1957).

Both of these cases were factually distinguishable from the case at hand that in both the *Garmon* and the *Guss* cases the action of the union involved was described as "peaceful picketing."

As in both of these cases, the Alaska Supreme Court, held that,

> "If this were a case marked by violence, intimidation or imminent threat to public order, then the State Court would be permitted to grant compensation for the consequences as defined by the law of torts."

The fact that this court in those cases considered an earlier case, *United Construction Workers v. Laburnum Construction Corp.*, 347 U.S. 656 (1954) without reversing it would indicate that it clearly distinguished that case from the rule applied by the court in the *Garmon* and *Guss* cases.

The facts in the *Laburnum* case were as follows:

> "While respondent was performing construction work in Breathitt County, Kentucky under contracts with Pond Creek Pocahontas Co. and others, July 26 to August 4, 1949, agents of the respective petitioners (union) came there.
>
> "They demanded that respondent's employees join the United Construction Workers and that respondent recognize that organization as the sole bargaining agent for respondent's employees on the project. They added that, if respondent and its employees did not comply, respondent would not be allowed to continue its work.
>
> "Upon respondent's refusal and that of many of its employees to yield to such demands, petitioner's agents *threatened and intimidated* respondent's officers and employees with violence to such a degree that respondent was compelled to abandon all its projects in that area.
>
> "The notice further alleged that as the result of this conduct of petitioner's agents respondent was deprived of substantial profits it otherwise would have earned on those and other projects."

It will be noted in the above statement of facts that in the *Laburnum* case, while there was *threatened* violence there was no *actual* violence shown.

In that case the court said:

> "If Virginia is denied jurisdiction in this case, it will mean that where the Federal preventive administrative procedures are impotent or inadequate, the offenders, by coercion of the type found here, may destroy property without liability for the damage done. If petitioners were unorganized private persons, conducting themselves as petitioners did here, Virginia would have had undoubted jurisdiction of this action against them. The fact that the petitioners are labor organizations with no contractual relations with respondent or its employees, provides no reasonable basis for a different conclusion."

In sustaining the jurisdiction of the Virginia Supreme Court in this *Laburnum* case, the Supreme Court did so on the strength of evidence that there was "threatened" violence.

We need not rely upon the holding in the *Laburnum* case where there was threatened violence, in the present case there was *actual physical violence* as well as threatened violence. So that it appears that the present case is a much stronger one in the eyes of this court reflected in the *Garmon* case and *Guss* case, *supra*, as well as the *Laburnum* case.

What of the term "violence"? It seems to be the recognized and unquestioned law that the laying on of hands by one person against the will of another constitutes violence. Black's Law Dictionary, 3rd ed., p. 1880, defines violence as follows.

> "Violence. The abuse of force; the force which is employed against common rights, against the laws, and against public liberty.
>
> "Violence is synonymous with physical force

and the two are used interchangeably in relation to assaults by elementary writers, by elementary writers on criminal law."

The New Twentieth Century Dictionary, unabridged, Webster, defines violence in part (p. 1919),

"In law, the unlawful use of physical force; intimidation by exciting fear of such force being used."

Certainly the above acts described, from the evidence in the present case, prove conclusively that there was violence as defined in the dictionaries, upon the customers of the petitioners.

It would seem that we were here urging the overruling of the last *Garmon* case and the *Guss* case, *supra*, wherein this court held that the National Labor Relations Board had exclusive jurisdiction over all acts which could be considered labor disputes. As pointed out above it would not be necessary to overrule the *Garmon* and *Guss* cases to reverse the decision of the Supreme Court of the State of Alaska here as definitely distinguishable from these cases in that here there is actual physical violence. Again, as noted above, the distinction made in the *Laburnum* case on this ground was based upon facts which were clearly much weaker than the facts here.

In the *Laburnum* case, *supra*, this court said,

"Because of the importance of the jurisdictional issue to the enforcement of common law rights and to the administration of Labor-Management Relations Act, we granted certiorari limited to the following question:

"'In view of the *type of conduct* found by the

> supreme court of appeals of Virginia to have been carried out by petitioners, does this Labor Relations Board have exclusive jurisdiction over the subject matter so as to preclude the state courts from hearing and determining the issues in common law tort (346 U.S. 936) action based upon misconduct?' "

This "type of conduct" was as above mentioned "threats of intimidation," but did not include actual physical violence as the present case does.

As the court stated in that case:

> "Here Congress had neither provided nor suggested any substitute for the traditional State Court procedures for collecting damages for injuries caused by tortuous conduct. For us to cut off the injured respondent from his right to recover will deprive it of its property without recourse or compensation. To do so will in effect grant petitioners immunity from all liability for their tortuous conduct. We see no substantial reason for reaching such a result. The contrary view is consistent with the language of the Act and there is positive support for it in our decisions and in the legislative history of the Act."

In the trial court memorandum considerable reliance is placed upon amendment to the N.L.R. Act, paragraph 10, which empowers the board to cede certain jurisdiction to the States. The court felt that unless the National Labor Relations Board did in fact cede a particular line of jurisdiction, the state would have none. This does not necessarily follow. As is indicated in the *Guss* case, *supra*, while the amendment gives the Board *power* to cede jurisdiction it does not direct it to. Therefore it does not follow that where the Board has failed

to cede this jurisdiction that it is not still retained as a constitutional right by the States.

It was felt that the issue of the lack of commerce evidence was too obvious. With regard to the commerce question it will be noted that prior to the commencement of the action petitioners were advised by both the general Counsel of the National Labor Relations Board and the Regional Director that this was a case over which it would not take jurisdiction (Ex. F, G and H). In other words, the dollar value of the business involved was not great enough.

Also as the evidence indicates there was no actual interference with commerce in view of the fact that the petitioners' business was purely local, that they sold all of their goods within the State of Alaska, importing approximately $400,000.00 worth from outside the State, which amount was considerably lower than the amount fixed by the Board as the limit of its jurisdiction.

Mention is made in the lower court's opinion of the 1959 Amendment to the Taft-Hartley Act, Section 1, which petitioners refer to as evidence that it was obviously the thinking of Congress that there should be no "no-man's land," created by the Act and thereupon specifically doing away with it.

This amendment also gives strength to the feeling running through all of the above cited cases that there is, as the court has said several times, a very fine line of demarcation between the jurisdiction of the Board and the jurisdiction of the States. It is submitted that that is the reason for the distinction between the *Laburnum*

case and the *Garmon* and *Guss* cases. As in the *Laburnum* case even the threat of violence, to say nothing of actual physical violence, is considered to be within a field over which the States have jurisdiction.

Even as late as March 5, 1962 in the case of *Local 174 Teamsters, Chauffeurs, Warehousemen and Helpers of America v. Lucas Flour Co.* (unreported, No. 50, October Term, 1961) this court ruled in a case involving similar issues that the Washington State Court had jurisdiction. In that case the union called a strike to force the employer to rehire a workman they had discharged because of unsatisfactory work. *The San Diego Building Trade Council v. Garmon* case, *supra*, was urged in that case as a ground for depriving the State of jurisdiction over the controversy but this court nevertheless refused to sanction that provision.

CONCLUSION

We have indicated above the reasons why this petition for a writ of certiorari should be granted. The judgment in the lower court was based upon the erroneous interpretation of the provisions of the National Labor Relations Act, the Alaska State and the United States Constitutions.

In the lower court the unlawful act of the respondents have been approved in effect.

While, since the enactment of the National Labor Relations Act there have been a number of decisions interpreting it all of them seem to want to preserve the constitutional rights of citizens and in particular their right to sue for damages for unlawful acts done to them.

It has been the constant pattern of labor unions in defending against damage suits brought in the state courts for their unlawful acts, to claim that most anything at all constitutes a labor dispute.

Here there was no labor dispute. The petitioners and the respondents were not parties to any labor agreement. The respondents had not been certified as the bargaining agent of the petitioners' employees. They simply set out to force the petitioner through threats, defamation, and the use of physical force against the petitioners' customers to accomplish their purpose.

The Regional Director and General Counsel of the National Labor Relations Board held that this was not a case affecting commerce and a case over which they would not take jurisdiction, there was no effect in the business of the petitioners on interstate commerce and there should have been no question even were there no threats, intimidations, or violence.

The lower court in affirming the trial court based its opinion on the holding of this court in the *Garmon* and *Guss* cases, *supra*. However as has been pointed out above this case is distinguishable from both of these cases in that here there was actual physical violence.

It is felt that the petitioners' cause can not be urged any more strongly than by the use of language in the *Laburnum* decision, *supra*,

> "Here Congress has neither provided nor suggested any substitute for the traditional state court procedure for collecting damages for injuries caused by tortious conduct."

Wherefore petitioners pray that this petition be granted and a Writ of Certiorari issued to review the judgment of the court below.

Respectfully submitted,

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